84-676

Case No. _____

UNITED STATES SUPREME COURT
1984 TERM

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC. and
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

HOBBS/BETHKE & ASSOCIATES
Larry F. Hobbs, P.C.*
William P. Bethke
Attorneys for Petitioner
5353 West Dartmouth Avenue, Suite 501
Denver, Colorado 80227-5564
(303) 989-5850

*Counsel of Record

QUESTIONS PRESENTED

1. Whether, if DelCostello v. Int'l Bro. of Teamsters, ___ U.S. ___, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), requires application of the limitation in 29 U.S.C. § 160(b) to an action under the Railway Labor Act (R.L.A.), 45 U.S.C. § 151, et seq., it should apply retroactively in view of 45 U.S.C. § 153 First (r) and Colo. Rev. Stat. § 13-80-106?

2. Whether, under DelCostello, an action alleging violation of the duty of fair representation in connection with a Board of Adjustment (Board) decision under Title II of the R.L.A., 45 U.S.C. § 181, et seq., is governed by the statute of limitations for actions relating to Board decisions under Title I of that Act, 45 U.S.C. § 153 First (r), or, instead, by the limitation for administrative charges of unfair labor

practices before the National Labor Relations Board, 29 U.S.C. § 160(b)?

3. Whether this action was timely under 45 U.S.C. § 153 First (r), and, specifically, when the action "accrued?"

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Frank E. Barnett petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REPORTS OF THE DECISIONS BELOW[1]

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[1] All parties are listed in the caption.

The first opinion of the Tenth Circuit Court of Appeals was reported at Barnett v. United Air Lines, Inc., 729 F.2d 693 (10th Cir. 1984), and appears at Appendix (App.) pp. 20-38.[2] The second opinion, granting plaintiff's petition for rehearing, withdrawing the first opinion, and vacating the judgment entered on the first is reported at Barnett v. United Air Lines, Inc., 738 F.2d 358 (10th Cir. 1984), and appears at App. 39-59.

JURISDICTION

The judgment of the Tenth Circuit entered June 21, 1984. A timely petition for rehearing was denied July 10, 1984. App. 60. This court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] Due to its length the appendix is under separate cover.

STATUTES

45 U.S.C. § 153 First (r) provides: "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

45 U.S.C. § 181 provides:

> All the provisions of Title I of this Act [45 U.S.C. § 151-163], except the provisions of section 3 thereof [45 U.S.C. § 153], are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Due to length 45 U.S.C. § 184 is set out verbatim in the appendix. App. 1-3. The most pertitent passage reads:

> It shall be the duty of every carrier and of its employees, acting through their representatives ... to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of section 3, Title I of this act [45 U.S.C. § 153].
>
> Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air of its or their employees; or pending the establishement of a permanent National Board of Adjustment as hereinafter provided. ...

Due to its length, 29 U.S.C. § 160(b) is set out verbatim in the

appendix. App. 4-6. The pertinent portion reads:

> Whenever it is charged that any person has engaged in or is engaging in any ... unfair labor practice [under 29 U.S.C. § 158], the [National Labor Relations] Board ... shall have power to issue ... a complaint ... Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...

Colo. Rev. Stat. § 13-80-106 reads:

> All actions upon a liability created by a federal statute, other than for a forfeiture or penalty[,] for which actions no period of limitations is provided in such statute, shall be commenced within two years or the period specified for comparable actions arising under Colorado law, whichever is longer, after the cause of action accrues.

STATEMENT OF THE CASE

I. JURISDICTION BELOW

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337.

II. FACTS AND PROCEEDINGS BELOW

Plaintiff Frank Barnett's (Barnett) Amended Complaint was dismissed on United Airline's (United) Motion to Dismiss and the Association of Flight Attendants' (AFA) Motion for Summary Judgment. App. 7-8. Both motions were based on statutes of limitations.

Plaintiff's Amended Complaint alleged breach of a collective bargaining agreement between the defendants and breach of the duty of fair representation in a Board of Adjustment (Board) proceeding conducted under the auspices of 45 U.S.C. § 184 -- i.e., the Title of the R.L.A. devoted to the airlines industry. App. 23-24. The Board decision alleged to be tainted by

the lack of fair representation was rendered September 7, 1978, but Barnett's first notice of the decision was a letter dated October 13, 1978, received several days later. App. 23. Barnett's complaint was filed October 14, 1980. App. 23.

United urged application of 45 U.S.C. § 153 First (r) to Barnett's action, while AFA advocated application of Colo. Rev. Stat. § 22-214(2). Barnett argued that his action was timely under either Colo. Rev. Stat. § 13-80-106 or 45 U.S.C. § 153 First (r). The district court, relying on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981),[3] selected a state

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[3] United Parcel Service v. Mitchell was decided over one year after Barnett's complaint was filed. DelCostello v. Teamsters, infra, was decided after briefing in this case was complete in the Court of Appeals.

limitation and dismissed the action as outside the limitation for applications to vacate arbitration awards under the Uniform Aribtration Act, Colo. Rev. Stat. § 13-22-214(2). App. 24. Colo. Rev. Stat. § 13-80-106 was found inapplicable on the grounds that Barnett's action was not on a liability "created by a federal statute." App. 14-15.[4]

The Court of Appeals first determined that a federal limitation should be borrowed to govern this action, and determined to apply 45

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[4] Contra, e.g., I.B.E.W. v. Foust, 442 U.S. 42, 46 (1979) ("statutory duty of fair representation ... imposed" by Congress); Vaca v. Sipes, 386 U.S. 171, 177 (1976) (fair representation is a "duty grounded in federal statutes"); Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944) ("We hold the language of the act ... expresses the aim of Congress to impose" duty of fair representation).

U.S.C. § 153 First (r) -- the statute governing any court action in relation to board of adjustment decisions under the original R.L.A. This decision came after DelCostello v. Int'l Bro. of Teamsters, supra, was decided, and brought to the notice of the court. Though 45 U.S.C. § 153 First (r) allows two years from "accrual" of the cause of action, the Court of Appeals found Barnett's action had accrued when the decision was rendered, and before Barnett had any notice of it, on September 7, 1978. It therefore found Barnett's complaint untimely by approximately five weeks. App. 33-36.

Barnett petitioned for rehearing, and argued that the Court's construction of an "accrual" limitation was incorrect. See, pp. 24-27, infra. The Court granted the petition and, relying

on DelCostello, changed the federal limitation it "borrowed" to the limitation for filing administrative charges of unfair labor practices under the N.L.R.A., 28 U.S.C. § 160(b).

Barnett again petitioned for rehearing and disputed, inter alia, the retroactive application of 29 U.S.C. § 160(b) to this action.

ARGUMENT

I. THE RETROACTIVITY OF DELCOSTELLO AND 29 U.S.C. § 160(B) IS THE SUBJECT OF A SPLIT IN THE CIRCUITS

The Courts of Appeals for the Third, Fourth, Fifth, Seventh, Eight, and Eleventh Circuits have determined to apply DelCostello and 29 U.S.C. § 160(b)

retroactively.[5] The Tenth Circuit decision in this case applies DelCostello and 29 U.S.C. § 160(b) retroactively without discussion.

The Court of Appeals for the Ninth Circuit has found retroactive application of DelCostello improper. See, e.g., Barina v. Gulf-Trading & Transp. Co., 726 F.2d 560 (9th Cir. 1984); McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir. 1983); Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983). Some of these individual

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[5] See, e.g., Lincoln v Dist. 9 of Int'l Ass'n of Machinists, 723 F.2d 627 (8th Cir. 1983); Murray v Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983); Edwards v Sea-Land Service, 720 F.2d 857 (5th Cir. 1983); Rogers v Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983); Perez v Dana Corp., 718 F.2d 581 (3rd Cir. 1983); Storck v. Int'l Bro. of Teamsters, 712 F.2d 1194 (7th Cir. 1983).

decisions could be reconciled, but the apparently per se rule of nonretroactivity in the Ninth Circuit and the apparently per se rule of retroactivity in at least some of the other circuits cannot be.

The criteria of Chevron Oil v. Hudson, 404 U.S. 97 (1971), govern the issue of retroactivity. The conflict concerns interpretation and application of these criteria.

The first criterion is that the decision "must establish a new principle of law ... by overruling clear past precedent ... or by deciding an issue ... not clearly foreshadowed." 404 U.S. at 106. Most courts have found DelCostello did not intrude on clearly established law. The Ninth Circuit, in Edwards v. Teamsters, supra, found that prior law clearly established the

principle of borrowing state limitations,[6] and that a California statute for "liability created by statute" clearly governed. Here, the state statute applies to "liability created by a federal statute," and was even more clearly a proper source for Barnett's reliance. See, n. 3, supra.

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[6] That state limitations were controlling was clear when this action was filed. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v Railway Express, 421 U.S. 454 (1975); Auto Workers v. Hoosier Cardinal, 383 U.S. 696 (1966); O'Sullivan v. Felix, 233 U.S. 318 (1914); Chattanooga Foundry v. Atlanta, 203 U.S. 390 (1906); McClaine v. Rankin, 197 U.S. 154 (1905); Campbell v. Haverhill, 155 U.S. 610 (1895); McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 277 (1830). The only contrary indications were clearly distinguishable. Occidental Life Ins. Co. v E.E.O.C., 432 U.S. 355 (1977) (no limitation proper); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (admiralty action); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (no limitation proper).

The unpredictability of DelCostello is particularly clear in a case under the R.L.A. Indeed, no party to this action in motion or brief filed before DelCostello even suggested 29 U.S.C. § 160(b) applied. As noted above, when United argued that a federal limitation was controlling it identified 45 U.S.C. § 153 First (r) -- a statute which would make this action timely.

The second Chevron criterion is determining whether retroactive application would retard or advance the purposes of the rule to be applied. The cicuits applying DelCostello retroactively have found its interest in uniformity controlling. The Ninth Circuit has found the reasons for allowing fair representation actions severely "disserved" by applying a shorter limitation not reasonably

predicatable to the litigant. Edwards, supra, 719 F.2d at 1040. In addition, the decision in this case has undermined a uniformity that already existed within Colorado law by virtue of Colo. Rev. Stat. § 13-80-106, and thus both serves and disserves the cause of uniformity in some measure.

The final Chevron criterion is the "inequity" attendant to applying the rule retroactively. That inequity is missing in many of the cases decided by other circuits which found the pre-DelCostello limitation to be, if anything, shorter. Here, again, the expressly applicable state limitation is longer, and rendered this action timely. See, Edwards, supra.

In sum, this case is an appropriate vehicle for this Court's resolution of the conflict in the circuits concerning

retroactive application of DelCostello and the limitation in 29 U.S.C. § 160(b).

II. THE MISSAPPLICATION OF 29 U.S.C. § 160(b) TO RAILWAY LABOR ACT CASES PROMISES FUTURE NONUNIFORMITY AND CONFLICT

The Tenth Circuit's first Barnett decision recognized the value of uniformity of the limitation for R.L.A. fair representation cases and applied 45 U.S.C. § 153 First (r), a limitation relating to Board decisions and within the four corners of the R.L.A. 729 U.S. 693. As the court correctly noted: "the refusal to apply section 153 First (r) would reject the specific policy decision made by Congress after it had viewed the competing interests involved. ... Cf. United Parcel, supra at 70 (Stewart, J., concurring)." App. 30.

Two subsequent decisions, however, from other circuits applied 29 U.S.C. § 160(b) in an R.L.A. context. Welyczo v. U.S. Air, 733 F.2d 239 (2nd Cir. 1984); Sisco v. Consol. Rail Corp., 732 F.2d 1188 (3rd Cir. 1984). On rehearing the Tenth Circuit conformed its position to that of the Second and Third Circuits. 738 F.2d 358. The very frailty of the reasoning supporting these decisions, however, makes evident the probabilty that today's superficial uniformity on this question will be short lived.

First, Welyczo contains no discussion whatsoever of 45 U.S.C. § 153 First (r). It appears that this statute was neither argued by the parties nor noted by the court. This may be because Welyczo's action would have been untimely under § 153 First (r), as well. More importantly, the

court found the distinction between the R.L.A. and the N.L.R.A. for limitations purposes "without import." This assertion will not withstand the test of time. It would require courts, in a fair representation challenge to a Board decision under Title I of the R.L.A., to simply disregard an expressly applicable statute of limitations in favor of a shorter, problematically "analogous" limitation.

Second, Sisco takes the astonishing step of applying 29 U.S.C. § 160(b) in preference to 45 U.S.C. § 153 First (r) in an action under Title I of the R.L.A. The slender textual reed for this decision is that Sisco was protesting the failure to take his case to a Board decision, and § 153 First (r) applies to decisions "under the award" of a Board. Apparently, in the Third Circuit, breach

of the duty of fair representation in the R.L.A. context now carries two statutes of limitations: 29 U.S.C. § 160(b) if the duty is breached by not purusing a case to Board decision, 45 U.S.C. § 153 First (r) if the duty is breached in the course of obtaining a Board decision. Barnett's situation falls in the latter category and, though under Title II, may presage an actual conflict between the Tenth and Third Circuits.

Finally, in Barnett the Tenth Circuit left this qualifiction:

> [W]e express no opinion about the proper limitations period to be applied to other possible "hybrid" claims ... [under] the RLA. ... The reasoning applied by the Court in DelCostello regarding the appropriate limitations period to borrow when two independently viable claims are combined might militate against borrowing the § 10(b) period in another type of

"hybrid" sitaution brought under the RLA.

App. 38 n. 4.

The reasoning, if not the square holdings, of these three cases is already difficult to reconcile with the approach of other circuits. The Ninth Circuit, for example, has characterized DelCostello's holding as limited to § 301 actions which "resemble an unfair labor practice charge." United Bro. of Carpenters & Joiners v F.M.C. Corp., 724 F.2d 816, 817 n. 1 (9th Cir. 1984) (29 U.S.C. § 160(b) inapplicable to an action by a Union to vacate an arbitration award under § 301). Accord Derwin v. General Dynamics Corp., 719 F.2d 484 (5th Cir. 1983). See, also, Int'l Union of Elec., Radio, etc. v. INGRAM, Mfg., 715 F.2d. 886 (5th Cir. 1983) (29 U.S.C. § 160(b) inapplicable

to "straight § 301" action to enforce arbitration award); Jenkins v. Local 705 Int'l Bro. of Teamsters, 713 F.2d 247 (7th Cir. 1983) (29 U.S.C. § 160(b) inapplicable to action under ERISA).

The opportunities for future conflict thus run along several lines. Potentially, courts will apply DelCostello depending upon:

(1) Whether a R.L.A. case sounds under Title I or Title II;

(2) Whether a R.L.A. fair representation case invovles an "award" by a Board, or the absence of an "award;"

(3) Whether the fair representation claim "resembles an unfair labor practice;"

(4) Whether each branch of a "hybrid" fair representation/contract

claim under the R.L.A. is "independantly viable."

The potential for conflict given these competing approaches is obvious.

The proposition that a limitation found in the R.L.A. should apply to all fair representation actions under the R.L.A. is apparently too obvious. That it would best assure uniformity of future decisions, and establish a predictable standard for litigants cannot be doubted.

DelCostello plainly requires that a federal limitation be applied in a case like this one. It does not compel use of 29 U.S.C. § 160(b) in every labor context. The Railway Labor Act provides another limitation, expressly applicable to some fair representation claims, and plainly the most nearly applicable to those its does not reach directly.

Uniformity of applicable limitations within the Railway Labor Act can only be achieved by application of 45 U.S.C. § 153 First (r) to fair representation actions under it. In the absence of such uniformity, and the presence, already, of divergent interpretations of DelCostello, future conflict is certain.

Admittedly, DelCostello and this case begin with no expressly applicable federal statute of limitations. Admittedly, DelCostello fairly compels a uniform federal standard. The question squarely presented is whether this Court's judgment that six months is both "long enough" and "short enough" for fair representation claims when comparing 29 U.S.C. § 106(b) with a variety of state statutes of limitations should control over "the specific policy decision made by Congress after it had

viewed the competing interests involved," in what is an essentially "identical" context. App. 30.

III. BARNETT'S ACTION WAS TIMELY UNDER 45 U.S.C. § 153 FIRST (r)

The only question presented by Barnett's pleading under 45 U.S.C. § 153 First (r) is whether his claim "accrued" when the Board, without his knowledge, acted, or when, over a month later, it mailed and he received, a copy of its decision.

In its first opinion the Tenth Circuit erroneously stated that Barnett had relied on Colorado law of "accrual" in arguing his action was timely under 45 U.S.C. § 153 First (r). Barnett argued that both Colorado law in relation to Colo. Rev. Stat. § 13-80-106, and federal law in relation to 45 U.S.C. § 153 First (r), placed

accrual at the point Barnett received notice of the Board decision. See, e.g., United States v. Kubrick, 444 U.S. 111, 123 (1979) (action accrues when one is "armed with the facts about the harm done to him"); Urie v. Thompson, 337 U.S. 163, 170 (1949) (accrual runs from "notice").

Indeed, even non-accrual statutes have been given essentially this construction in federal law. "'[A] limitation period begins to run "when the claimaint discovers or in the exercize of reasonable diligence should have discovered, the acts constituting the alleged [violation]"'' N.L.R.B. v. Don Burgess Const. Corp., 596 F.2d 378, 382 (9th Cir. 1979) (citations omitted, construing 29 U.S.C. § 160(b)).

This rule has been applied to fair representation claims. In Benson v.

General Motors Corp., 715 F.2d 862 (11th Cir. 1983), the court reversed a grant of summary judgment on limitation grounds. The complaint concerned deprivation of senicrity credit, and the court found the limitation began to run when the seniority list "was in fact posted at the Tuscaloosa plant" where the plaintiffs worked. 715 F.2d at 864. Lacking evidence in the record establishing this date, the court remanded for further evidentiary proceedings. See, also, Scott v. Local 863, Int'l Bro. of Teamsteres, 725 F.2d 226, 229-231 (3rd Cir. 1984) (Becker, J., concurring) (arguing that time for fair representation claim must run from date of receipt of relevant notice).

Barnett's action was plainly within two years of the time he first received notice of the Board's decision. No lack

of diligence on his part accounts for the discrepancy between the time of decision and notice of decision. His aciton was timely under 45 U.S.C. First § 153(r).

Thus, the grounds for certiorari otherwise presented are appropriately considered in this case. In addition, the discrepancy between the first Barnett opinion, though withdrawn, and the decision in Benson, supra, suggests that it is at least appropriate for this court to determine when the time for a claim of unfair representation begins to run.

CONCLUSION

For the foregoing reasons, petitioner Frank Barnett requests certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

HOBBS/BETHKE & ASSOCIATES

By _____
Larry F. Hobbs, P.C.
William P. Bethke

Attorneys for Plaintiff
5353 West Dartmouth Avenue, #501
Denver, CO 80227-5564
(303) 989-5850

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI was deposited in the United States Mail, postage prepaid, this 9TH day of October, 1984, addressed to:

Mr. Richard O. Campbell
Montgomery, Little, Campbell
and McGrew, P.C.
P. O. Box 22795
Denver, CO 80222

Mr. John A. Criswell
Criswell, Patterson, McNamara
Myles and Bell
3780 South Broadway
Englewood, CO 80110

Mr. Robert H. Brown
United Airlines, Inc.
P. O. Box 66100
Chicago, IL 60666

Mr. Robert S. Savelson
Mr. Peter Herman
Cohen, Weiss and Simon
330 West 42nd Street, 25th Floor
New York, NY 10036